76-736

IN THE

Supreme Court of the United States

October Term, 1976

No. .....

LA MIRADA TRUCKING, INC., Etc., *et al.*,

Petitioners,

vs.

TEAMSTERS LOCAL UNION 166, Etc., *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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November 24, 1976.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, La Mirada Trucking, Inc., and Engineering and Grading Contractors Association, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above captioned case on July 13, 1976, in Case No. 74-2436 of that Court.

Opinions Below.

The opinion of the Court of Appeals is reported at 538 F.2d 286 and appears at Appendix A of this petition. The Findings of Fact and Conclusions of Law of the District Court were stated orally on the record, are unreported, and appear at Appendix B.

Jurisdiction.

The opinion of the Court of Appeals for the Ninth Circuit was entered on July 13, 1976. A timely petition for rehearing was denied on August 30, 1976, by an order which appears at Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. §1254, June 25, 1948, c. 646, 62 Stat. 928.

Questions Presented.

The questions presented by this petition for writ of certiorari are:

1. Does an unfair labor practice within the meaning of 29 U.S.C. §158(e) occur when a prohibited "hot cargo" agreement is enforced through an arbitrator's award of damages for breach of the agreement?

2. May judicial enforcement be granted an arbitration award which gives effect to an unlawful "hot cargo" agreement?

3. May a sand pit and a beach area located five miles apart comprise a single "site" within the meaning of the construction industry proviso to 29 U.S.C. §158(e), so that the work of transporting and delivering sand from the pit to the beach can lawfully be covered by a "hot cargo" agreement?

4. Does 29 U.S.C. §158(e) proscribe an agreement which is interpreted to require an employer to cease doing business with "owner-operators" of dump trucks as independent contractors and to make payroll employees of such "owner-operators" engaged in transporting and delivering sand from a pit five miles along public highways to a beach area?

Statutory Provisions Involved.

The statute involved in this case is 29 U.S.C. §158 (e), September 14, 1959, Pub. L. 86-257, Title VII, §704(b), 73 Stat. 543-544, which reads in pertinent part as follows:

> "(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . ."

Statement of the Case.

Petitioners, La Mirada Trucking, Inc. (La Mirada) and the Engineering and Grading Contractors Association, Inc. (EGCA), brought this action in state court seeking to vacate an award made by an arbitrator arising from a dispute under a collective bargaining agreement between the petitioners and the respondent unions (Union). The Union removed the case to federal district court pursuant to 28 U.S.C. §1441(a), invoking federal jurisdiction under 29 U.S.C. §185(a), and counterclaimed seeking enforcement of the award.

Members of EGCA are bound to a collective bargaining agreement with the Union. The State of California awarded a prime contract to Fontana Paving, a contractor member of EGCA. The contract included work on a beach area adjacent to the shoreline of the New Silverwood Lake. Fontana subcontracted the preparation of the beach area to C. W. Poss, Inc., another member of EGCA. Fontana entered into a direct royalty agreement with the owner of a nearby pit which had been suggested by the State as a source of raw materials. Poss awarded a subcontract to the Watkin Construction Company, the owner of a screening plant, to screen large rocks out of the sand at the pit site so the sand could be placed on the beach. The processed material, both sand and separated rock, were stockpiled at the pit. Poss awarded a further subcontract to La Mirada, also a member of EGCA, to transport the sand from the pit to the beach. The trip between the pit and the beach was about five miles along public highway. La Mirada, an overlying carrier licensed by the State of California, engaged several owner-operators of dump trucks to transport the sand to the beach. Once at the beach site, the trucks drove through the beach area, dropping the sand through "bottom dumps" without stopping, and then returned to the pit for additional loads.

Article XIX of the collective bargaining agreement between EGCA and the Union places restrictions on the use of owner-operators by members of EGCA, including La Mirada. However, the provisions of Article XIX are expressly limited to apply only when the work by the owner-operators is to be performed at the site of construction within the meaning of 29

U.S.C. §158(e). Specifically, paragraph 1921 of Article XIX provides:

> "Notwithstanding any other provision of this Agreement, this Article XIX shall be applicable only to owner-operators performing (or who, upon their employment, will be performing) work to be done at the site of the construction, alteration, painting or repair of a building, structure or other construction work."

If an employer bound by the collective bargaining agreement uses owner-operators to perform work covered by Article XIX, then each owner-operator is required to be placed on the payroll of the employer, to be paid at rates established by the agreement, and to join the Union.

Paragraph 1919 provides for enforcement of Article XIX through the award of damages against La Mirada as follows:

> "If a Contractor through the grievance procedure is found violating any portion of this Article [XIX], the [arbitrator] shall require the Contractor immediately to pay compensatory damages for each owner-operator with respect to whom the Contractor is in violation in the amount of one day's pay at the highest hourly rate covering wage and fringe benefit costs under this Agreement for each day or portion thereof the violation occurred, such damages to be made payable to the Construction Teamsters Security Fund by check mailed to the respective Local Union. The [arbitrator] may also grant such further relief as may be deemed appropriate."

For the work of transporting and delivering sand involved in this case, La Mirada dealt with each of the owner-operators as an independent contractor and did not place any of them on the payroll. The Union notified La Mirada that these owner-operators should be regarded as covered by Article XIX and placed on the payroll. La Mirada refused, the Union filed a grievance, and the dispute was submitted to an arbitrator as provided by the collective bargaining agreement. The submission to the arbitrator specified that the parties to the collective bargaining agreement intended the scope of coverage of Article XIX be identical to the scope of coverage of the construction industry proviso to Section 8(e) of the Labor Management Relations Act [29 U.S.C. §158(e)]. The issue for the arbitrator was whether the work performed by the owner-operators in transporting and delivering the sand from the pit to the beach area was within the scope of work described in the construction industry proviso to Section 8(e).

The memorandum opinion of the arbitrator appears at Appendix D to this petition. In his final analysis, the arbitrator stated that if hauling of materials along public highways were excluded from the coverage of Article XIX, then practically no owner-operators would be covered by the collective bargaining agreement, and Article XIX would thereby be rendered meaningless. Thereupon, the arbitrator decided that La Mirada was obligated to place the owner-operators on its payroll and to cover them by the collective bargaining agreement. Since the parties had stipulated to a bifurcated trial of the issue of coverage before trial of the amount of damages due, the arbitrator retained jurisdiction

ir case the amount of damages due under the agreement could not be determined consensually.

In the district court, the parties stipulated as to the facts underlying the controversy. La Mirada and EGCA contended that the arbitrator had exceeded the bounds of his authority in making the award and that the arbitration award adopted an interpretation of the collective bargaining agreement in violation of the prohibition against "hot cargo" agreements in Section 8(e). The district court held that the arbitrator did not manifest any violation of his authority, and declined to consider the second contention on the ground that the National Labor Relations Board has exclusive jurisdiction to consider alleged unfair labor practices arising under Section 8(e). Judgment was entered for the Union enforcing the arbitration award. On appeal, the Court of Appeals agreed that the arbitrator did not exceed his authority, but ruled that federal courts do have jurisdiction to consider an alleged violation of Section 8(e) in the context of an action to enforce an arbitration award. On the merits of that issue, the Court of Appeals ruled that no violation of Section 8(e) had occurred, and affirmed the judgment of the district court, on grounds that "since the award is only one for damages, La Mirada is not being asked to do anything which could possibly be an unfair labor practice." Additionally, the Court of Appeals held "reasonable" the decision of the arbitrator that the owner-operators' work was performed "on-site" on grounds that the "beach, pit, and the [five miles] between them was the job site."

REASONS FOR GRANTING THE WRIT.

I.

This Case Presents for Determination the Validity of a "Hot Cargo" Agreement of the Type Commonly Required by the Teamsters Union to Cover Hauling of Construction Materials From Sources Other Than Permanent Facilities.

Since passage of the general prohibition against "hot cargo" agreements under Section 8(e) of the Labor Management Relations Act [29 U.S.C. §158(e)] in 1959, the Teamsters Union has been striving to recover a portion of the organizing advantages of such agreements by claiming the benefit of the construction industry exception to the general prohibition. For most of those years since 1959, construction industry employers and employers engaged in the transportation of construction materials have been embroiled in the controversy and turmoil resulting from the Teamsters' efforts to require "hot cargo" agreements covering the hauling of construction materials such as dirt, excavation debris, sand, aggregate and other bulk materials.

The disputed agreement in this case is binding upon a multi-employer bargaining unit comprised of most such employers in Southern California, and substantially all remaining employers in that area are bound by the same terms through incorporation in individual "short form" collective bargaining agreements. Comparable "hot cargo" agreements covering such work have been included in collective bargaining agreements by the Teamsters in Northern California and elsewhere across the country.

Such work of construction materials hauling has traditionally been performed by individuals who own

and operate dump truck equipment as independent contractors, moving from project to protect as the need for their equipment and services demands. Such owner-operators are regulated as "underlying carriers" in the transportation industry in California by the State Public Utilities Commission.

The Union in this case has sought to subject the owner-operators to union membership by first requiring the employers engaged in construction projects and materials hauling to cease doing business with the owner-operators as independent contractors. Then the Union requires the owner-operators to become payroll employees subject to the union security provisions of the collective bargaining agreement. The owner-operators have vigorously opposed such efforts, and confrontations between the owner-operators and the Union representatives have repeatedly engulfed California employers such as La Mirada since at least the mid-1960's.

While the Union has formally limited its demands to covering jobsite work, the wide divergence in views between the Union and the employers as to the lawful scope of the jobsite limitation in the context of construction materials hauling has led to countless disputes. In practice, many employers have undoubtedly succumbed to the constant Union pressure to use owner-operators only as payroll employees for hauling construction materials over the public highway.

At great personal sacrifice and expense, La Mirada has endeavored to bring before this Court at last an opportunity to resolve this conflict by setting lawful limits on the application of "hot cargo" agreements to construction materials hauling.

II.

The Court of Appeals Clearly Erred in Ruling That an Arbitrator's Award of Damages for a Breach of an Unlawful "Hot Cargo" Agreement Cannot Be a Violation of 29 U.S.C. §158(e).

The Court of Appeals states in its opinion (Appendix A, pp. 4, 5-6):

> "[Appellants] argue that if La Mirada is required to comply with the terms of the award and hire only owner-operators who are or will become union members, La Mirada will commit an unfair labor practice in violation of Section 8(e).
>
> . . .
>
> "The . . . ground alleged by appellants for refusing to grant enforcement of the award is that if the award is carried out, La Mirada will be forced to engage in an unfair labor practice. However, since the award is only one for damages, La Mirada is not being asked to do anything which could possibly be an unfair labor practice. Thus, appellants' argument has no basis in fact."

This holding by the Court of Appeals is squarely contrary to previous statements of this Court, other decisions of the Ninth Circuit, and the decisions of other circuits of the courts of appeals. This Court recognized in *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 634, 87 S.Ct. 1250, 1263 (1967) that the specific, primary intent of Congress in enacting Section 8(e) was to foreclose the possibility of recovery of damages as a means of enforcing "hot cargo" agreements. Moreover, this Court has held that a complete cessation of business is not necessary to constitute a prohibited "cease doing business" objective, and the courts of appeals have been in apparent agreement

that the payment of damages for breach of an agreement requiring a significant change in a secondary person's method of doing business impliedly prohibits doing business with another person. *N.L.R.B. v. Local 825, I.U.O.E.*, 400 U.S. 297, 304-305, 91 S.Ct. 402, 407-408 (1971); *N.L.R.B. v. I.B.E.W., etc.*, 405 F.2d 159, 162-164 (9th Cir. 1968); *cert. denied*, 395 U.S. 912; *Associated General Contractors, etc., v. N.L.R.B.*, 514 F.2d 433, 437 (9th Cir. 1975); *Danielson v. International, etc., AFL-CIO*, 521 F.2d 747, 753, note 7 (2nd Cir. 1975).

Had the Court of Appeals reasoned otherwise, its decision might have concluded that the "cease doing business" requirement contained in Article XIX was made lawful by its limitation to the "site" of construction within the meaning of the construction industry proviso to Section 8(e), and that the amount of damages set by Paragraph 1919 was not so onerous as to amount to economic coercion to enforce the agreement. However, the holding of the Court of Appeals was not based in such reasoning and, in any event, the application of Article XIX by the arbitrator has not been limited to work at the "site", as will be shown.

III.

Judicial Enforcement Should Not Be Granted an Arbitration Award Which Gives Effect to an Agreement With a Meaning Violative of 29 U.S.C. §158(e).

The Court of Appeals reversed the ruling of the district court that federal courts are jurisdictionally pre-empted from considering an alleged violation of Section 8(e) as a ground for refusing enforcement of an arbitration award. The ruling of the Court of

Appeals on this point was broadly based on grounds that, since the National Labor Relations Board has no authority to consider actions seeking review and enforcement of an arbitration award granting damages for breach of a collective bargaining agreement, the district court need not defer to the Board. (Appendix A, p. 4.)

However, having determined to review the arbitration award for a possible violation of Section 8(e), the Court of Appeals then appears to test for the violation of Section 8(e) with special deference to the views of the arbitrator. Specifically, the Court of Appeals twice states that the arbitrator was "reasonable" in adopting the views that the owner-operators' work was "on-site" and that the "site" included both the beach and the sand pit.

Apart from the invalidity of the premises stated, which will be discussed *infra,* the issue requiring attention at this point is whether an arbitrator's views deserve any deference whatsoever in determining the underlying congressional policy and proper statutory construction of Section 8(e). Of course, La Mirada views the issues of the scope of the "site" and the work coverable by "hot cargo" agreements as matters of law, independent of any arbitrator's views or any other reflection of consensual undertakings of private parties. In the view of La Mirada, no less rigorous consideration of statutory construction may be used to decide labor law questions that emerge as collateral issues in suits to vacate or enforce arbitration awards than has been exemplified by this Court in deciding such questions arising in suits brought under other independent federal remedies. *Connell Construction Company, Inc. v. Plumbers, etc., Local Union No. 100,* ..... U.S. ....., 95 S.Ct. 1830, 1837-1841 (1975).

IV.

The Court of Appeals Has Adopted an Expansionary View of the Construction Jobsite Without Precedent and Contrary to Prior Decisions of the Ninth Circuit, Other Courts of Appeals, and the Express Views of This Court.

The Court of Appeals stated (Appendix A, p. 6):

> ". . . the jobsite here included both the beach and special sand processing plant set up at the pit solely for this construction job. The entire area of beach, pit, and the space between them was the jobsite—and the owner-operators were merely transporting the sand from one point on the jobsite to another point on the jobsite."

In so ruling, the Court of Appeals recognized (Appendix A, p. 2) that "the trip between the pit and the beach was about five miles along public highway." The Court of Appeals distinguished, without citing, cases holding the delivery and pouring of ready-mix concrete to be "off site" work [*Connecticut Sand and Stone Corporation,* 138 NLRB 532 (1962); *Island Dock Lumber, Inc.,* 145 NLRB 484 (1963), [enf'd.] 342 F.2d 18 (2nd Cir. 1965); *Drivers Local 695 v. N.L.R.B.* (*Madison Employers Council*), 361 F.2d 547, 552-553 (D.C. Cir. 1966)] on grounds that pouring ready-mix concrete into forms does not amount to as much activity at the site as when the owner-operators drive through the beach area dumping sand without stopping. Further, the Court of Appeals viewed such cases as distinguishable "because the materials were transported from external suppliers of materials who manufactured them at a regular plant rather than a special processing center, set up solely for this job, at a location near where the materials would ultimately

be used." This latter ground of distinction gives credence to the contention made by the Union that its "hot cargo" agreements should be permitted to cover any source of materials which is so impermanent that it has not been organized and covered by a collective bargaining agreement with the Union.

This expansionary view of the jobsite, and thus of the nature of work permitted to be covered by "hot cargo" agreements, is incapable of reconciliation with previously expressed views of this Court, the Ninth Circuit, and other circuits of the courts of appeals. *Connell Construction Co., Inc. v. Plumbers, etc., Local Union No. 100, supra,* 95 S.Ct., at 1838-1840; *Acco Construction Equipment, Inc. v. NLRB,* 511 F.2d 848, 851-852 (9th Cir. 1975); *Associated General Contractors, etc. v. NLRB, supra,* 514 F.2d at 439 (9th Cir. 1975); *Drivers, etc., Local 695 v. NLRB, supra,* 361 F.2d at 551 (D.C. Cir. 1966).

V.

The Owner-Operators Are Independent Contractors, and Article XIX Requires a Substantial Change in Their Method of Doing Business With Contractors Signatory to the Agreement.

Based upon the record of documentary evidence, the Court of Appeals found that:

> "La Mirada dealt with each of the owner-operators as an independent contractor and did not place any of them on the payroll." (Appendix A, p. 2.)

Therefore, the requirement of Article XIX, as enforced by the arbitrator, that La Mirada do business only with owner-operators who will change their status from independent contractor to payroll employee is clearly

tantamount to requiring a cessation of business with those owner-operators. *N.L.R.B. v. Local 825, I.U.O.E., supra,* 400 U.S., at 304-305; *N.L.R.B. v. I.B.E.W., etc., supra,* 405 F.2d, at 162-164; *Associated General Contractors, etc. v. N.L.R.B., supra,* 514 F.2d, at 437; *Danielson v. International, etc., AFL-CIO, supra,* 521 F.2d, at 753, note 7. This "cease doing business" requirement contained in an agreement construed by the arbitrator to apply to work not performed at the "site" completes the showing that a violation of Section 8(e) is given effect by the arbitration award.

Conclusion.

Based upon the foregoing, the errors made in the decision of the Court of Appeals should not be permited to deny justice to the parties in this case or to stand as precedent in this important area of labor policy. For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

WAYNE JETT,
Counsel for Petitioners.

November 24, 1976.

APPENDIX

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

La Mirada Trucking, Inc. and Engineering and Grading Contractors Association, Inc., Petitioners-Appellants, vs. Teamsters Local Union 166, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Joint Counsel of Teamsters #42; Teamsters Local Union 87, Respondents-Appellees. No. 74-2436.

[July 13, 1976].

On Appeal from the United States District Court for the Central District of California.

Before: CHAMBERS, DUNIWAY, and KILKENNY, Circuit Judges

CHAMBERS, Circuit Judge:

Appellants, La Mirada Trucking, Inc. and the Engineering Grading Contractors Association, Inc. (EGCA), brought this action in state court seeking to vacate an award made by an arbitrator arising from a dispute between the appellants and the appellee unions. Appellees removed the case to federal district court and counterclaimed seeking enforcement of the award. The parties stipulated as to the facts underlying the controversy and the district court entered judgment for the appellees, ordering the arbitration award to be enforced. This appeal followed.

The State of California awarded a prime contract to Fontana Paving, a contractor member of the EGCA. The contract included work on a beach area adjacent

to the shoreline of the New Silverwood Lake. Fontana subcontracted the preparation of the beach area to C. W. Poss, Inc., another member of EGCA. Fontana entered into a direct royalty agreement with the owner of a nearby pit which had been suggested by the state as a source of raw materials. Poss awarded a subcontract to the Watkin Construction Co., the owner of a portable screening plant, to screen large rocks out of the sand at the pit site so the sand could then be placed on the beach. The processed materials, both sand and separated rock, were stockpiled at the pit. Poss awarded a further subcontract to La Mirada Trucking, Inc., another EGCA member, to transport the sand from the pit to the beach and spread the sand at the beach site. The trip between the pit and the beach was about five miles along public highway. La Mirada, a licensed overlying carrier, engaged several owner-operators of dump trucks to drive the sand to the beach. Once at the beach site, the trucks drove up and down the site depositing sand without stopping.

La Mirada dealt with each of the owner-operators as an independent contractor and did not place any of them on the payroll. Article XIX of the master labor agreement between the Engineering and Grading Contractors Association and the Joint Council and local unions governs the rights and responsibilities of contractors, union and owner-operators. Article XIX calls for the contractor carrying the owner-operators on his payroll and governs the matters of union membership, the owner-operators compensation and hiring practices. However, paragraph 1921 of Article XIX provides:

> Notwithstanding any other provision of this Agreement, the Article XIX shall be applicable only to owner-operators performing (or who, upon their employment, will be performing) work to be done at the site of the construction, alteration, painting or repair of a building, structure or other construction work.

The union notified La Mirada that it felt that the owner-operators of the dump trucks should be placed on the payroll and subject to the other provisions of Article XIX. This would have in effect required La Mirada to deal only with owner-operators who were or would become union members. The parties were unable to agree to a solution to the dispute, so it was submitted to an arbitrator in compliance with the terms of the master agreement. The issue before the arbitrator was, in effect, whether the work performed by the owner-operators was work performed at a construction site (on-site work) such as to bring them within the scope of Article XIX of the master agreement. The submission to the arbitrator specified that the parties to the contract intended that the scope of coverage of Article XIX be identical to the scope of the construction industry proviso to Sec. 8(e) of the Labor Management Relations Act [29 U.S.C. Sec. 158(e)]. The arbitrator considering this dispute and another similar one arising under Article XIX, decided that the owner-operators' work was on-site work and the provisions of Article XIX applied to them.

In both the court below and this court, the appellants raise two grounds upon which they contend that the arbitrator's order should be vacated. First, they contend that the award is beyond the scope of the submission made to the arbitrator and therefore is invalid. Second, they contend that because of the interpretation given

to the on-site provision of paragraph 1921, the master agreement is extended to include compulsory union membership as a precondition to the hiring or doing business with persons when such condition cannot be applied under Sec. 8(e) of the LMRA. Therefore, they argue that if La Mirada is required to comply with the terms of the award and hire only owner-operators who are or will become union members, La Mirada will commit an unfair labor practice in violation of Sec. 8(e).

Before reaching the merits of these two arguments, consideration must be given to the jurisdiction of the district court to entertain this suit. Under 29 U.S.C. Sec. 185(a), a district court has jurisdiction to hear "suits for violations of contracts between an employer and a labor organization . . ." This jurisdiction extends to actions to enforce arbitration awards. The National Labor Relations Board has no jurisdiction to consider cases arising from the breach of a current collective bargaining agreement. *Fibreboard Paper Products Corp. v. Machinists Local 1304*, 344 F.2d 300 (9th Cir. 1965). This suit is one seeking review of and enforcement of an arbitrator's award granting damages for breach of a collective bargaining agreement. Since the National Labor Relations Board has no authority to hear such an action, the district court need not defer to it.

The decisions of this court are clear that where an arbitrator does not draw the award from the agreement and exceeds the boundary of the submission to him, the award will be held invalid. *Holly Sugar Corp. v. Distillery, Rectifying, Wine, & Allied Workers Int'l Union*, 412 F.2d 899 (9th Cir. 1969); *San Francisco-Oakland Newspaper Guild v. Tribune Publishing Co.*,

407 F.2d 1327 (9th Cir. 1969). The appellants have charged that the arbitrator failed to faithfully meet his obligation in interpreting the contract. They argue that it was understood between the parties at the time of the adoption of paragraph 1921 of Article XIX that any coverage question as to the scope of the paragraph would be determined based only on the extent of legally allowable coverage under Sec. 8(e) of the LMRA. The parties intended to apply the agreement to all owner-operators they could without violating the law. This was specified in the submission to the arbitrator. Certain language in the arbitrator's memorandum deciding this case is cited by the appellants to show that the arbitrator looked to some intent of the parties as derived from the terms of the master agreement rather than properly deciding the coverage issue by reference to the law of permissible coverage under Sec. 8(e). We have reviewed the memorandum of the arbitrator in this case as well as his more complete analysis of the meaning of paragraph 1921 given in the opinion in the companion Gruen Construction matter, applied explicitly to this case by the terms of the memorandum deciding it. From these awards, it is clear that the arbitrator decided the meaning of contractual "on-site" coverage based on the permissible coverage of such agreements under Sec. 8(e). The arbitrator carried out his obligation under the contract.

The second ground alleged by appellants for refusing to grant enforcement of the award is that if the award is carried out, La Mirada will be forced to engage in an unfair labor practice. However, since the award is only one for damages, La Mirada is not being asked to do anything which could possibly be an unfair

labor practice. Thus, appellants' argument has no basis in fact.

Additionally, we find that the arbitrator's decision that the work performed by the truck owner-operators was done "on-site" was reasonable. While the standards in determining on-site and off-site work are not totally clear, it seems a reasonable decision of the arbitrator that the job site here included both the beach and the special sand processing plant set up at the pit solely for this construction job. The entire area of beach, pit, and the space between them was the job site and the owner-operators were merely transporting the sand from one point on the job site to another point on the job site. This conclusion is reinforced by the activity of the owner-operators in spreading the sand on the beach. While there are cases holding that transportation of construction materials to a job site is not on-site work, these cases are distinguishable because the materials were transported from external suppliers of materials who manufactured them at a regular plant rather than a special processing center, set up solely for this job, at a location near where the materials would ultimately be used. Both the screening plant and beach are the job site and delivery from one point to the other is on-site work. Therefore, the district court committed no error in refusing to vacate the award.

The appellants also charge that the district court committed error when it failed to take judicial notice of the factual findings of the NLRB as to the status of the owner-operators as independent contractors or employees. Since the work performed was on-site work, this distinction had no relevance to the existence of

a potential unfair trade practice or as to the propriety of the award. There was no error, therefore, in the refusal to take judicial notice.

The order of the district court is affirmed.

APPENDIX B.

Reporter's Transcript of Proceedings.

In the United States District Court, Central District of California.

Honorable Irving Hill, Judge Presiding.

La Mirada Trucking, Inc., etc., et al.. Plaintiffs, vs. Teamsters Local Union 166, etc., et ai., Defendants. Case No. 72-2701-IH.

LOS ANGELES, CALIFORNIA, FRIDAY, MAY 31, 1974, 3:00 O'CLOCK P.M.

* * *

THE COURT: Gentlemen, you can stay seated and make some notes, if you wish.

I am not going to keep you in suspense. I am deciding to enforce the award. Judgment will be for the defendants on their counterclaim, and for defendants as against plaintiffs on the original complaint, and the award will be ordered enforced.

Now, I am sure that I do not have to find any facts. They are all stipulated too. Don't you agree, gentlemen?

MR. REICH: Yes, your Honor.

MR. JETT: Your Honor, I never got to that point when we were discussing it; but my stipulation of facts also raised questions of fact—

THE COURT: Well, I will get to that in a minute.

If you do not agree, then I find the facts as stipulated.

It is my duty, gentlemen, before enunciating the rationale of the decision that I have made to turn to the thing you are talking about, Mr. Jett, the statement of questions of fact and question of law to be decided, filed by the parties under the date of April 26th.

That is the document, Mr. Jett, correct?

MR. JETT: Yes, your Honor.

THE COURT: Nos. 1 and 2 on that document are posed as questions of fact to be decided, namely, "1. Did the arbitrator attribute to the bargaining parties an intent to cover substantially all of the work of owner-operators for the bargaining contractors?"

And "2. In reaching his decision, did the arbitrator depend upon a concept that the bargaining parties contemplated that work of the nature of the disputed work would be covered by Section 1921 of the agreement?"

I have quoted those two sections exactly as set forth in the document filed April 26th.

I note the defendants contend that those alleged factual issues are irrelevant to a decision of the case and to a decision of the issue of law which follows them in the document of April 26th as the sole issue of law to be decided.

I agree with the defendants' position. I find these two factual issues to be irrelevant and, therefore, do not decide them. Plaintiff seeks to have both of those two alleged issues answered in the affirmative. Even if both questions, both issues, were answered in the affirmative, such affirmative answers would not justify refusal to enforce the award. Such affirmative answers would nevertheless not constitute grounds of the type which under existing law require setting aside the award and its nonenforcement.

I pass now to the sole issue of law posed in the April 26th document: Did the arbitrator William Levin exceed his powers under the collective bargaining agreement and the parties' submission in rendering his award dated July 25, 1972?

I answer that question in the negative and find that he did not exceed his power.

Now, I would like to spend a few minutes analyzing the case; and in analyzing it, I think it is convenient to adopt the basic format with which plaintiff has written its brief.

The first question posed is, did the arbitrator exceed his authority in that:

(A) The award does not "draw its essence" from the agreement; and

(B) In that his language manifests "an infidelity" to his obligation.

What the arbitrator did in this case does not depart from his proper function under the contract. The contract requires a determination of whether work is or is not done at the job site. That issue was central to the controversy which was submitted to him. He found relevant facts and then applied legal precedents to that question. He wrote a literate and persuasive opinion. In this respect I refer primarily to his opinion in Green, which he incorporated in his opinion in La Mirada.

Now, when you look at what he did, and his resolution of the controversy, his decision, surely it cannot be called an award which "does not draw its essence" from the collective bargaining agreement and the arbitration agreement contained therein.

Now, what I have just said is what I would repeat as the basis for rejecting the claim that the arbitrator demonstrated "infidelity" to his obligation. Plaintiff's reliance on P.U.C. coverage as being absolutely determinative does not impress me and does not result in setting aside the award. At the very most, even

if this is conceded to be an error of law, it's the kind of error of law which does not vitiate the award; and I find it not an error of law because the P.U.C. coverage rule is not necessarily determinative of the instant controversy.

We pass to plaintiff's second major issue, alleged illegality of the act which plaintiff is required to perform if the award is enforced. Plaintiff says enforcement makes the plaintiff perform an unfair labor practice in violation of Section 8(e) of the NLRA.

In the first place, I think such a statement of the issue poses the problem in an improper and inapplicable context. When we step back and look at this situation, here is what we see. Plaintiff made a contract with the union which covers job site employment and provided for arbitration in the event of a dispute under the contract. The arbitrator interpreted the contract and found that the employment in question was covered. Enforcement merely requires plaintiff to perform his contractual obligation.

The arbitrator considered the decisions which had been enunciated by the NLRB and the courts under Section 8(e). He considered them, as I say. Those decisions, of course, are not governing because they involve different facts. It was within his competence to render the decision he did, and the decision is entitled to enforcement.

Now, secondly, on this alleged illegality issue, is the argument that—well, put it another way. The argument made that the decision requires an illegal act depends upon my assuming that the NLRB, if the same facts were presented to it, would hold the contract covering these truckers to be a violation of 8(e).

If plaintiff is asking me to place myself in that position, namely, the position of the NLRB, I very much doubt that the NLRB would deny enforcement of the contractual obligation on the grounds of illegality.

As developed during the argument, the NLRB itself has enunciated a policy of enforcing arbitration awards and agreements which call for colorably illegal activity, i.e., things that might otherwise be unfair labor practices, on the ground that the public policy favoring arbitration in collective bargaining relationships must be nurtured and supported. Of course, the NLRB has made it clear that the policy in favor of arbitration does not justify enforcement of arbitration awards involving contracts which clearly violate the central public policy of the NLRA.

In my view, what is involved in the instant case is not that type of serious illegality and would not so violate the central public policy and, therefore, the NLRB, under its prior decisions, which in most instances have been affirmed by the Courts of Appeal to which they were presented, in my view, the NLRB, under its prior decisions, would wind up enforcing this contract and arbitration award.

But the assumption that plaintiff seems to be asserting that I put myself in the NLRB's position may not be a valid assumption. I am not the NLRB. The NLRB is the only agency vested with the authority to delineate and prohibit an unfair labor practice. So plaintiff's request that I do so would cause me to exceed my jurisdiction and violate the statutory scheme, and violate the exclusivity which Congress has given to the Board.

Section 301 allows me to decide questions arising under the contract even though the facts might also support a claim for unfair labor practice. There is no preemption of such question, according to the case law. However, the primary jurisdiction of the Board reserves to the Board the precise question of whether an unfair labor practice will result or exist. And that is reserved for the Board alone.

To the extent that that Second Circuit decision indicates—and it is the dictum, I think—the contrary of what I have just said, I believe that that decision is wrong, and I would decline to follow it—although I have the greatest respect for that Circuit.

Now, there is another aspect that should be discussed. The plaintiff was well aware of the statutory exclusivity of the NLRB to define unfair labor practices and prohibit them. If plaintiff wished to invoke that jurisdiction, plaintiff had ample opportunity. Under well-defined case law after the arbitration went against the plaintiff, the plaintiff could have gone right to the NLRB claiming that the award caused the plaintiff to commit an unfair labor practice, and invoking the Board's help in precluding enforcement against the plaintiff. But plaintiff chose to bypass the NLRB. There is a well-known principle of equity that one cannot bypass a remedy and thereafter in effect assert the same remedy in a different forum.

Now, one more word. This award seems not only well-considered, but the result it reaches does not offend any sensibility of the court or the court's sense of propriety. In looking at arbitration awards and deciding whether or not to enforce them, a court has a most limited function, and all presumptions are indulged

in favor of the award. Only a small group of major errors can result in nonenforcement.

As I look at this award, the result reached could rationally be reached on the basis of the facts before the arbitrator and found by him. Nothing about this offends the court.

The claimed illegality is nothing like the illegality that was involved in some holdings in which arbitration awards were upset for illegality. There is really only one holding that I have found—you gentlemen have not cited it to me—and it is Black v. Cutter Laboratories, 43 Cal. 2d 788. That is the one holding, although there are other dicta. And in Black the illegality was a matter vital to the national security.

This is also not the kind of illegal contract which in a few cases has resulted in nonenforcement of the contract or the awards under it. There are a few such cases where the contract was held to be illegal. Among those are the Loving case, Loving & Evans v. Blick, 33 Cal. 2d 606; and Hurd v. Hodge, 334 U.S. 24, which involved a racially restrictive covenant.

Now, gentlemen, I am sorry that I have gone on so long, but I felt that because of the excellent briefing and the effort you have placed into the matter that you deserved some exposition of the court's thinking.

If it should turn out that findings of fact and conclusions of law are required, will counsel agree that a transcript of my remarks since the recess will constitute that. Mr. Jett?

MR. JETT: Your Honor, I believe it will be necessary, and I would be willing, if counsel is, to stipulate that the remarks so constitute.

THE COURT: Mr. Reich?

MR. REICH: Yes, your Honor.

THE COURT: All right. Then my remarks—and a transcript will be filed as soon as it can be prepared—will constitute my findings of fact and conclusions of law.

APPENDIX C.

Order Denying Petition for Rehearing.

United States Court of Appeals, for the Ninth Circuit.

La Mirada Trucking, Inc., etc., et al., Appellants, vs. Teamsters Local Union 166, etc., et al., Appellees. No. 74-2436.

FILED: August 30, 1976.

Before: CHAMBERS, DUNIWAY and KILKENNY, Circuit Judges.

The petition for rehearing is denied.

APPENDIX D.

Memorandum Opinion.

In the Matter of Arbitration Between Teamster Local 166 and La Mirada Trucking, Inc.

The facts are undisputed:

The State of California awarded Fontana Paving, a contractor member of EGCA, a prime contract, which included work on a beach area adjacent to a shoreline of the New Silverwood Lake. Fontana awarded a subcontract for the beach area to C. W. Poss, Inc., another contractor member of EGCA. In the specifications of the contract between the State and Fontana, the State identified a pit on the Los Flores Ranch as a satisfactory source for raw materials for producing beach sand; the source was not mandated, however, in the contract. Poss indicated to Fontana that it intended to use this pit as its source of raw materials; and Fontana entered into a direct royalty agreement with the ranch, so that the amount of such royalties would not be included within the subcontract price. Poss then awarded a contract to Watkin Construction Company, owner of a screening plant, to perform the necessary work to process the raw materials by "screening out" oversized particles. The screening plant was portable.

The "set up" of the plant was begun about March 20th and the plant began production about March 31, 1972, operating continuously thereafter through on or about April 24th. The processed materials, both beach sand and the separated oversized particles, were stockpiled. Poss had two men on the payroll at the screening plant, the superintendent "running the operation" and a loader-operator (an operating engineer).

Poss subcontracted with La Mirada Trucking, Inc. to engage the services of owner-operators to transport approximately 30,000 to 35,000 tons of processed sand from the stockpile location along the public highway, to the Silverwood beach area, about five miles away. La Mirada is licensed as a carrier by California PUC. The owner-operators transported the sand along the route on April 14, 17, 18, 19, 25, and 26. They used double-bottomed dump trucks and dumped their load of beach sand as they rolled through the beach area.

Poss attempted to solicit business from other purchasers of sand and oversized particles produced for it under the Watkins contract, but the market was limited. Approximately 400 tons of sand were sold to one purchaser and approximately 110 tons of rock to another. After the job was completed, the rock plant, which had not been set up at Los Flores prior to this job, was dismantled.

C. W. Poss, Jr. owns all the stock of La Mirada and two-thirds of the stock of Poss and serves as president of both. However, the corporations are separate members of EGCA.

No purpose would be served in repeating the discussion in the *Green Construction* opinion. Again, as in that matter, I believe the screening operation was, in a real sense, part of the "integrated" operation of that portion of the work which Poss subcontracted to perform along the beach area. The screening plant and its operation had no independent existence prior to the work in question; and when that work was finished, the portable screening plant was dismantled and removed. Poss' superintendent was on the site

at all times, apparently, per the stipulated facts, "running the operation." The fact that sand representing approximately one percent of the total amount produced was sold to others does not change the basic proposition that Poss controlled the operation and ran it for the job in question.

The fact that there was substantial co-ownership of Poss and La Mirada has not influenced my decision. But weighing all the factors—the constant supervision by Poss, the close proximity of the sand processing operation to the spot where it was dumped, the fact that the screening plant had no independent existence and was dismantled when the job was concluded, and the nature of the use for which the sand was processed (to dump it on a beach area being created)—I have concluded that the sand processing plant was an integral part of the construction work and was part of the site. The fact that Fontana itself entered into an agreement to purchase the sand strengthens this conclusion. Further, the fact that the owner-operators drove a few miles on public highway or had their rates set by PUC does not alter my conclusion. The PUC's setting certain rates does not mean that higher rates cannot be paid, if required under a collective bargaining agreement. If the PUC regulation was determinative of the issue, this could in effect exclude most, if not all owner-operators, and might render meaningless the bargaining agreement language.

The liability of Poss and La Mirada is joint and several, as discussed in the *Green Construction* case. Consistent with the stipulated request by the parties, the undersigned will not attempt at this time to determine a proper remedy but will leave this to the parties,

retaining jurisdiction in the event the parties are unable to agree.

Dated: July 25, 1972.

/s/ William Levin
WILLIAM LEVIN

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of December, A.D. 1976.

IN THE

Supreme Court of the United States

October Term, 1976
No. 76-736

LA MIRADA TRUCKING, INC., Etc., *et al.*,
Petitioners,

vs.

TEAMSTERS LOCAL UNION 166, Etc., *et al.*,
Respondents.

Respondent Teamsters Local Union 166's Brief in Opposition to the Granting of Certiorari.

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TEAMSTERS LOCAL UNION 166, Etc., *et al.*,
Respondents.

Respondent Teamsters Local Union 166's Brief in Opposition to the Granting of Certiorari.

Respondent Teamsters Local Union 166 opposes the petition for a writ of certiorari, on the ground that neither the issues nor the facts make this an appropriate case for the granting of a writ.

The reasons advanced by the petitioners in support of the proposition that an important question of law is presented, are not supported by citations to the record.[1] And for good reason. There is no evidence in the record to support the petitioners' arguments.

In truth, this case simply revolves around how one arbitrator applied the facts before him, to contract language which is not itself under attack. Parenthetically, since the parties had stipulated to a bifurcated

[1] *See* Rules of the Supreme Court No. 40(2), requiring references to the record.

trial on liability and damages, the case is not yet even complete. *See* Petition for Writ of Certiorari at 6-7.

If certiorari is granted, the Court would be reviewing the peculiar facts of this case, and not, as petitioners suggest, the general application of the parties' contract language. Even if the questions presented were important, the Court would not have an opportunity to get to those questions on this limited record.

For these reasons, the granting of certiorari is inappropriate.

Respectfully submitted,

JULIUS REICH, A Member of
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By JULIUS REICH,
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